Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 85-2096

In the Supreme Court of the United States

OCTOBER TERM, 1985

HENRY J. KRUEGER, JR.,
AIRMAN BASIC, U.S. AIR FORCE, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment of the Constitution of the United States requires military authorities to preserve urine samples of military members suspected of drug abuse in order for the results of urinalysis tests performed thereon to be admissible in criminal prosecutions when the defense requested, prior to the destruction of the urine sample, that it be retained?

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v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Airman Basic Henry J. Kreuger, Jr., United States Air Force, respectfully petitions for a writ of certiorari to review the judgement and summary disposition of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review is unpublished (Appendix A). The summary disposition of the United States Court of Military Appeals is reported at 22 M.J. 210 (C.M.A. 1986) (Appendix B).

JURISDICTION

The judgement of the United States Court of Military Appeals was entered on April 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law."

STATUTORY PROVISIONS INVOLVED

Article 46 of the Uniform Code of Military Justice (10 U.S.C. 846) provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

STATEMENT OF THE CASE

On 14-15 March 1984, the petitioner was tried by special court-martial at Holloman Air Force Base, New Mexico, convened by order of the Commander, 833rd Combat Support Group (Tactical Air Command). Contrary to his plea, he was convicted of one specification of wrongful use of marijuana in violation of Article 134 of the Uniform Code of Military Justice (U.C.M.J.) (10 U.S.C. 934). The court-martial sentenced the petitioner to be discharged from the United States Air Force with a Bad Conduct Discharge and to be confined at hard labor for 45 days. The convening authority approved the findings of guilty and sentence as adjudged on 22 May 1984. The United States Air Force Court of Military Review affirmed the findings of guilty and the sentence as approved on 24 October 1984. Upon discretionary review pursuant to Article 67(b)(3), U.C.M.J., (10 U.S.C. 867(b)(3)), the United States Court of Military Appeals, on 25 April 1986, affirmed the decision of the United States Air Force Court of Military Review.

On 11 August 1983, the petitioner was ordered to provide a urine sample as part of a non-probable cause inspection sweep of the military unit to which he was assigned (R. 110). The sample was eventually turned over to hospital personnel at Holloman Air Force Base, who in turn forwarded all samples to the drug detection laboratory at Brooks Air Force Base (R. 134). After the samples were received by Sergeant Michael J. Schomer, the noncommissioned officer in charge of specimen shipping and receiving section of the Brooks laboratory, an alliquot of urine was released to the toxicology section (R. 139). It was later discovered that the majority of the sample retained by the receiving section had been

destroyed, despite the fact that the government authorities at Holloman Air Force Base had sent instructions on 1 September 1983 to the Brooks laboratory to maintain the sample pending completion of court-martial action (R. 56 and Appellate Exhibit XVI). What remained after testing by the toxicology section was again returned to Sergeant Schomer (R. 141).

On 28 November 1983, Sergeant Schomer sent half of the remainder of the sample, approximately 4 to 5 milliliters, to the Center for Human Toxicology at the University of Utah for testing (R. 145). Dr. Michael A. Peat of the Center for Human Toxicology testified that less than 1 milliliter of urine was received by his laboratory. A gas-chromatograph mass-spectrometry test of the sample revealed the presence of a cannabinoid metabolyte, which indicated ingestion of marijuana within the previous forty-five days (R. 158-172). The result of the urinalysis test of this sample, together with the expert testimony concerning the test, was the sole evidence presented by the government on the issue of guilt.

As early as 26 September 1983, the petitioner's attorney requested that an independent urinalysis be done (Appellate Exhibit XIV). According to the allied papers, the petitioner's military defense counsel was approached and asked whether he would object to the remainder of the urine sample being sent to the Center for Human Toxicology for retesting. While counsel did not object, he did not consent. One of the documents points out that Airman Krueger's civilian counsel was the only person authorized to make this decision (Appellate Exhibits XVII-XX).

At trial, the defense maintained that the charge and specification should be dismissed or the test result evidence excluded because of the government's failure to furnish the defense with a sample for independent testing (R. 49, Appellate Exhibit IX). The military judge denied the motion, after making the following findings of facts:

> Number *one*, the Defense made a timely request for an independent retest of the Accused's urine. Number *two*, the Government made an immediate request to the Drug Abuse Detection Laboratory at Brooks that the specimen

in the case be preserved. Number *three*, the laboratory at Brooks was aware that the specimens were to be retained and preserved. Number *four*, the specimen was regrettably but inadvertently destroyed on a date unknown by a person unknown. Number *five*, the Government's sending of the specimen to Doctor Peat's lab for a retest was a good faith effort to attempt to comply with the Defense's request for an independent retest. Number *six*, Doctor Peat's lab was not under contract to the Government at the time of the test and was not a Government testing facility, but was an independent lab. Number *seven*, there was no reasonable basis for believing that an independent retest by the Schoenfeld Lab would have resulted in any favorable evidence to the Defense (R. 97-98; emphasis added).

REASONS FOR GRANTING THE WRIT

In affirming the Air Force Court of Military Review's decision in the petitioner's case, the United States Court of Military Appeals relied on *United States v. Kern,* 22 M.J. 49 (C.M.A. 1986) and *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

United States v. Kern, supra, involved an individual convicted of larceny of government property. The government authorities had disposed of the property prior to the court-martial. The government could, and apparently did, produce photographs and an inventory of the property. The trial judge held that the government's inability to produce the property did not affect the appellant's ability to defend against the theft (the taking), but it did affect his ability to defend on the element of value. Consequently the military judge amended the specification from property of a value of $2,647.72 to property of "some value", which had a significant effect on the maximum imposable punishment. *Supra* at 50.

The pertinent ruling in *United States v. Kern, supra,* applicable to the petitioner's case is that "The rule announced in *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial." In applying the *Trombetta* rule to the facts of

United States v. Kern, the Court of Military Appeals held that the government did not have to produce the allegedly stolen property to prosecute, stating that the remedy devised by the trial judge was adequate. Supra at 52.

The rule announced by this Honorable Court in *United States v. Trombetta* is:

> To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S. 109-110, evidence must both possess exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Supra at 489. A proper application of the *Trombetta* rule to the facts of the petitioner's case should result in a ruling that, unlike the result in *United States v. Trombetta, supra,* the Due Process Clause of the Fifth Amendment requires government authorities to preserve urine samples in order to introduce urinalysis tests at trial when the defense requested, prior to the destruction of the urine sample, that it be retained.

The exculpatory value of the sample was apparent to the government before the sample was destroyed. In *Trombetta,* there was no indication that the respondent ever requested that the breath sample be provided to him until after it was destroyed. In this case, the defense specifically requested, before the urine sample was destroyed, that it be preserved for independent testing. The government sent instructions to the laboratory to preserve the sample. Unlike *Trombetta* where the breath sample was destroyed in good faith and in accordance with the law enforcement officials' normal practice, the urine sample here was destroyed negligently at best and contrary to express direction by the government authorities. The action by the government in instructing the laboratory to retain the sample clearly indicates that the government had reason to believe, before the destruction of the sample, that the sample possessed exculpatory value. This determination by the government was further reinforced by the actual notice of the defense assertion that the sample possessed exculpatory value provided by the defense

request. The sample's exculpatory value was, therefore, not in issue at the time the sample was destroyed.

In its brief before the United States Court of Military Appeals, the government asserted that "The case *sub judice* is, on all points, the same as *Trombetta*." The government then attempted to equate the reliability of the urinalysis testing procedure with that of the Intoxilyzer and the California testing procedures in an effort to show that the urine sample was, as was the breath sample in *Trombetta*, much more likely to provide inculpatory than exculpatory evidence. Many factors contradict that assertion. In addition to the two differences noted above concerning the request for retention of the sample, the following significant factual differences exist:

(1) In *Trombetta*, the breath sample was tested immediately upon seizure and the respondent knew immediately that the result of the Intoxilyzer was positive, whereas, in *Krueger*, the time between the taking of the sample and the its testing was lengthy and the petitioner did not know the result of the test until much too late to seek independent tests on other samples provided contemporaneously with the sample on which the government's test was done.

(2) In *Trombetta*, the law enforcement official who procured the breath sample appears to be the same person as the one who performed the test, whereas, in *Krueger*, the urine sample passed through numerous hands before actually ever being tested.

(3) In *Trombetta*, the respondent was present for the testing and could know the sample being tested was in fact his own, whereas the petitioner in *Krueger* had no such guarantee.

(4) In *Trombetta*, two separate samples were taken and independently tested, whereas, in *Krueger*, only one sample was tested by the several tests.

These factors demonstrate fundamental differences between an on-the-scene Intoxilyzer test and the protracted procedure involved in a urinalysis and caution against assigning the same degree of reliability to a urinalysis as was assigned to the Intoxilyzer in *Trombetta*. The urinalysis

testing procedure is not so free from error as to warrant the assumption of regularity or accuracy assigned to the Intoxilyzer and the California testing procedures.

Furthermore, the petitioner could not obtain comparable evidence by other reasonably available means. In *Trombetta,* this Honorable Court emphasized that the respondent therein had alternate, reasonably available means of demonstrating their innocence because there were (1) only a limited number of ways in which an Intozilyzer might malfunction, and (2) only two sources capable of interfering with test results, both of which the respondent could have established with relative ease. In the petitioner's case, many more, less obvious, outside influences could have interferred, some of which the defense could not have establish except by a major stroke of luck. For example, there are people who deliberately adulterate urine samples as demonstrated by the case of *United States v. Solar,* ACM 25277, currently pending before the Air Force Court of Military Review. Negligence within the testing facility can easily result in an inadvertant adulteration of a sample or the switching of the sample by one of the many people who handled it. There is certainly evidence of negligent handling of samples present in the petitioner's case. The important point is that neither of these sources of interference can usually be raised by the defense other than as speculation only. Such proof falls short of the reasonably available, alternative means of demonstrating innocence described in *Trombetta. See Banks v. Federal Aviation Administration,* 687 F.2d 92 (1982).

If the effect of the application of the *Trombetta* rule is to require the defense to *prove* that the urine sample would have provided exculpatory evidence, the burden is impossible. Once the sample was destroyed, there is no way to obtain such evidence. The United States Court of Military Appeals stated in *United States v. Kern, supra* at 52, "To require the Government to prove that the lost evidence was not exculpatory would be an insurmountable burden . . ." Is it any less an insurmountable burden for the defense to *prove* that the lost evidence was exculpatory?

If the result of the urinalysis is admissible under the *Trombetta* rule, it should still be inadmissible based on the military standard of due process. The military standard of due process regarding access to evidence set forth in Article 46, U.C.M.J., states that "The trial counsel, the defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . ." Article 46 does not speak to exculpatory or inculpatory nature of the evidence, only to equal opportunity. In the petitioner's case, the defense counsel was denied all opportunity to obtain any evidence from the urine sample.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, the petition for certiorari should issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES AIR FORCE COURT OF MILITARY REVIEWS

ACM S26405

UNITED STATES

v.

AIRMAN BASIC HENRY J. KRUEGER, JR., FR 375-64-2364
UNITED STATES AIR FORCE

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24 OCTOBER 1984

Sentence adjudged 15 March 1984 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: David W. Wofford (sitting alone).

Approved sentence: Bad conduct discharge and confinement at hard labor for forty-five (45) days.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major Kathleen G. O'Reilly. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major Robert S. Schwartz.

Before FORAY, SNYDER and O'HAIR, Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights

of the accused was commited. *United States v. Frost*, ____ M.J. ____ (A.F.C.M.R. 12 September 1984). Accordingly, the findings of guilty and sentence are AFFIRMED.

OFFICIAL:

/s/ Elva J. Smith

ELVA J. SMITH
Documents Examiner
Court of Military Review

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51382/AF
CMR Dkt. No. S26405

UNITED STATES, APPELLEE

v.

HENRY J. KRUEGER, JR., (375-64-2364) APPELLANT

ORDER

On consideration of the granted issue (20 M.J. 11) in light of *United States v. Kern,* 22 M.J. 49 (C.M.A. 1986), and *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), it is, by the Court, this 25th day of April, 1986,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
JOHN A. CUTTS, III
Deputy Clerk of the Court

cc. The Judge Advocate General of the Air Force
Appellate Defense Counsel (HUDSPETH)
Appellate Government Counsel (KISTLER)

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